Supreme Court, U.S.
FILED
NOV. 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-442

In the

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC., NWA, INC., BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF OF PETITIONER

EUGENE COTTON
One IBM Plaza - Suite 4750
Chicago, Illinois 60611
(312) 467-0590
Counsel of Record

RICHARD F. WATT
ROBERT H. NICHOLS
RUSSELL WOODY
MICHAEL H. SLUTSKY
One IBM Plaza - Suite 4750
Chicago, Illinois 60611
(312) 467-0590
Counsel for Petitioner

Of Counsel:
COTTON, WATT, JONES & KING
One IBM Plaza - Suite 4750
Chicago, Illinois 60611
(312) 467-0590

November 6, 1986

CHAS. P YOUNG COMPANY 282

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. Respondents' Arguments That the Seventh Circuit's Decision Neither Raises an Important Issue Nor Conflicts With Decisions of This Court or Other Courts of Appeals Are Unpersuasive	1
A. The Court Below Erred in Holding That the Present Case Raises a Representation Dispute	1
B. The Lower Courts Have Not Consistently Recognized That the Relief Sought Here Would Interfere With The NMB's Jurisdiction	3
C. Granting *Status Quo* Relief Would Not Decide the Representational Issue	4
D. The NMB Procedures Are Not Adequate to Provide The Relief Sought	5
E. The Decision Below is Inconsistent With the Decisions of this Court	6
II. On the Merits, Respondents Have Violated the RLA	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	PAGE
Aircraft Mechanics Fraternal Association v. United Airlines, Inc., 406 F. Supp. 492 (N.D. Cal. 1976)	4
Air Line Pilots Ass'n, Int'l v. Scheduled Skyways, Inc., 567 F. Supp. 171 (W.D. Ark. 1983), *aff'd in part on other grds*, 738 F.2d 339 (8th Cir.), *appeal dismissed as moot*, 746 F.2d 456 (8th Cir. 1984)	5
Air Line Pilots Association v. Texas International Airlines, Inc., 656 F.2d 16 (2d Cir. 1981)	3
Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc., 325 F.2d 576 (6th Cir. 1963), *cert. dismissed as improvidently granted*, 379 U.S. 26 (1964)	4
Chicago & North Western Railway Co. v. United Transportation Union, 402 U.S. 570 (1971)	5
Division No. 14, Order of Railroad Telegraphers v. Leighty, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962)	3, 4
International Association of Machinists v. Northeast Airlines, Inc., 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976)	4
International Brhd of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983)	3
NLRB v. Hudson Berlind Corp., 494 F.2d 1200 (2d Cir. 1974)	8
Pan American World Airways, Inc. v. International Brotherhood of Teamsters, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd sub nom. Brotherhood of Railway, Airline and Steamship Clerks v. Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969)	6, 8
Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964)	4
Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943)	6, 7, 9
Texas & New Orleans Railroad Co. v. Brhd of Railway & Steamship Clerks, 281 U.S. 548 (1930)	4, 7
Texidor v. Ceresa, 590 F.2d 357 (1st Cir. 1978)	4
Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 (1937)	7, 8

AGENCY DECISIONS PAGE

Pan American World Airways, Inc., 7 NMB (No. 110) (1980) 5, 6, 8

Republic Airlines, Inc./Hughes Air West, 7 NMB 432 (No. 219) (1980) 2

Republic Airlines, Inc./Hughes Air Corp., 8 NMB 13 (No. 3) (1980) 2, 5, 6

STATUTES AND REGULATIONS

National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* 8

Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*

Section 2, 45 U.S.C. § 152 ..... 2, 9

REPLY BRIEF OF PETITIONER

Petitioner Air Line Employees Association, International ("ALEA") files the present reply brief in response to the brief in opposition to ALEA's petition for certiorari filed by respondents Republic Airlines, Inc. ("Republic"), Northwest Airlines, Inc. ("Northwest") and NWA, Inc. ("NWA").[1]

I. Respondents' Arguments That the Seventh Circuit's Decision Neither Raises an Important Issue Nor Conflicts With Decisions of This Court or Other Courts of Appeals are Unpersuasive

Respondents offer a series of arguments in an effort to show that the present case does not merit review; each is unpersuasive.

A. The Court Below Erred in Holding That the Present Case Raises a Representation Dispute

Respondents argue that the court below correctly determined that ALEA's complaint raises a representation dispute (Respondents' Brief in Opposition (herein "Opp.") at 9-10). Respondents' conclusion, however, is based on a mischaracterization of ALEA's claim. ALEA did *not* ask the district court to determine that it, rather than some other union, is or should be certified for the indefinite future to be the post-merger collective bargaining representative of all employees in a merged craft or class or even of the Republic employees it has long represented, without regard to the results of the election to be held by the National Mediation Board ("NMB"). Moreover, ALEA has acknowledged that a determination of the appropriate craft or class necessarily has to be made by the NMB before it can hold an election and certify a representative. ALEA has acknowledged that it is the function of the NMB—after the NMB determines the appropriate craft or class on the merged airline—to conduct an election and thereafter to certify a representative based on the free choice of the affected employees. Thus, in this lawsuit—contrary to the argument of respondents—ALEA did not invite the district court to invade the province of the NMB either in determining the appropriate craft or

---

[1] An amicus curiae brief in opposition to ALEA's petition for certiorari was filed by the Brotherhood of Railway and Airline Clerks ("BRAC") and the International Association of Machinists and Aerospace Workers ("IAM"). Since that brief makes no arguments not made by respondents, ALEA does not respond separately to that brief.

class or in certifying the post-merger collective bargaining representative. Rather, the present suit concerns respondents' conduct during the critical period between their announcement of a merger and the NMB's ultimate certification of a bargaining representative, during which the protections of section 2, Third and Fourth of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Third & Fourth, against carrier interference, influence or coercion are so important. It is with respect to this period that the court below held that there is no judicial remedy—and hence no remedy at all—for violations of the RLA.

Indeed, respondents' principal acts of interference with, influence and coercion of employees in the selection of their representative were the acts, *prior to the consummation of the merger*, of unilateral recognition of and bargaining with other unions regarding employees represented by ALEA. It is undisputed that the NMB will not even entertain a representation petition prior to approval by the Department of Transportation of a merger. *Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 13 (No. 3) (1980); *Republic Airlines, Inc./Hughes Air West*, 7 NMB 432 (No. 219) (1980).[2]

In short, this case is not a representation dispute subject to the exclusive jurisdiction of the NMB, since ALEA did not ask the district court to determine either of the representation questions which are reserved for the NMB: what is the appropriate craft or class, and which union will be the certified representative following a representation election.

Respondents also assert that the interim judicial relief ALEA seeks "would not serve to ensure Northwest's 'neutrality' during the NMB proceedings, but rather would decide who would represent the former employees during the period it was in effect" (Opp. at 19). Respondents are in error in two respects. First, requiring respondents to recognize and bargain with ALEA prior to NMB certification would, in fact, go a long way toward ensuring the carriers' neutrality, since much of the carriers' assistance to and favoritism for BRAC and IAM is predicated on Northwest's recognition of those unions and its exclusion of ALEA from participation in contract administration (including grievance handling and participation in the System Board of Adjustment) and

---

[2] The underlying grievance and the present lawsuit were both filed before the merger was approved by the DOT.

from having any of the other valuable rights, including communication with employees, which an incumbent union may exercise. Second, the judicial relief sought by ALEA would not decide the ultimate representation questions (the appropriate craft or class and the certification of a representative after an election); while it would continue the *status quo*—the existing status of ALEA as the representative of the Republic employees "during the period it was in effect" —that is not a decision of a representation question reserved for the NMB. The effect of such a court order would be only to require compliance with the substantive provisions of the RLA, which proscribe interference with, coercion and influence in the selection of a representative.

B. The Lower Courts Have Not Consistently Recognized That The Relief Sought Here Would Interfere With the NMB's Jurisdiction

Respondents' second argument is that the lower federal courts have consistently recognized that injunctions to preserve the *status quo* following a merger impermissibly interfere with the NMB's jurisdiction (Opp. at 11-15). ALEA, of course, does not dispute that some lower court decisions have taken an extreme view of the limitations of federal court jurisdiction, at least insofar as the breadth of the language used by those courts is concerned.[3]

Respondents are incorrect, however, in characterizing other cases as falling within the same line of cases. First, some cases, while declining to grant the particular relief requested, have merely held that the particular relief sought would have altered, rather than preserved, the *status quo* and therefore would not be a neutral judicial act.[4] Second, other courts, in declining federal court jurisdiction, have done so where, in the court's view, the request would have required

---

[3] *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983); *Air Line Pilots Association, International v. Texas International Airlines, Inc.*, 656 F.2d 16, 23 (2d Cir. 1981).

[4] *E.g., Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert denied*, 369 U.S. 885 (1962), cited by the court in *Teamsters v. Texas International*, *supra*, for the proposition that the courts may not grant interim *status quo* injunctive relief, merely holds that *the particular relief there sought* would have altered, rather than preserved, the *status quo* and would therefore not have been a neutral judicial act.

the court effectively to determine the representational question—the identity of the employee representative—even though the complaint on its face purported to raise statutory or contractual, rather than representational, issues.[5] Third, in still other cases where courts have not upheld jurisdiction, they have suggested that under other circumstances jurisdiction could be invoked.[6] Other cases uphold jurisdiction even where a representation dispute may be involved.[7]

Thus, contrary to respondents' contention, the lower courts are by no means consistent in dealing with cases such as the present case where interim *status quo* relief is sought, and where the plaintiff does *not* seek judicial determination of the representation questions reserved to the NMB: the appropriate craft or class and the determination of the certified collective bargaining representative following a representational election.

C. Granting *Status Quo* Relief Would Not Decide the Representational Issue

Respondents also argue (Opp. at 12) that granting the relief requested in the present case would "constitute an

---

[5] *E.g., Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed as improvidently granted*, 379 U.S. 26 (1964); *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *Division No. 14, Order of Railroad Telegraphers v. Leighty, supra.*

[6] In *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir. 1976), *cert. denied*, 429 U.S. 961 (1976), cited by the district court in the present case, the court stated that the merger of Northeast with Delta Airlines, a much larger carrier, "created real doubts about whether plaintiffs [the union previously certified as representative of Northeast's mechanics] represent the majority of any Delta craft or class of employees, and where there is such doubt, federal courts leave resolution of the dispute to the National Mediation Board." The implication was that, absent such doubts, the court might have been willing to entertain the case. And, in *Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492, 508 (N.D. Cal. 1976), the court found that the exclusive jurisdiction of the NMB precluded judicial intervention except in "extreme cases of rampant employer domination of the labor relations scene such as are exhibited by company union situations." Approving that view, the First Circuit, in *Texidor v. Ceresa*, 590 F.2d 357, 359 (1st Cir. 1978), likewise held that "the implied grant of judicial jurisdiction under Section 2 Third should be limited to the kind of coercion and outrageous company unionism involved in *Texas & N.O. Ry. Co.* . . ., the case which first announced that such jurisdiction existed."

[7] *See* cases cited in ALEA's petition at 18-19 nn. 19 & 20.

active, interim disposition of the representation question" and would thus interfere with the NMB's exclusive jurisdiction. As indicated above, the NMB does not even have jurisdiction until a merger is approved by the DOT, prior to which period the principal violations of the RLA occurred in this case and are likely to occur in other airline mergers.

In addition, even as to the period after the merger is approved, the relief sought in the present case would not interfere, but would aid, the NMB in assuring a representation election free of carrier coercion, influence and interference. This is true not only because the NMB has no authority to order a carrier to recognize or bargain with a particular union. It is also true because a *status quo* injunction does *not* decide the representation questions (the appropriate post-merger craft or class and which union is the certified representative following an election). Rather, such *status quo* relief would accomplish just that: preserving the *status quo* so that each union may continue to represent those employees who have selected it prior to the merger, until the NMB determines the appropriate craft or class in which representation is to be established following the merger and certifies a representative for that craft or class.

D. The NMB Procedures Are Not Adequate to Provide the Relief Sought

Respondents also argue that the NMB's procedures are adequate to provide relief of the sort sought by ALEA (Opp. at 15-17). This argument is belied by the NMB's own description of its limited authority[8] and by judicial confirmation of such limited authority.[9]

Respondents nevertheless assert that there are three remedies which ALEA could obtain from the NMB. "First,"

---

[8] *Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 13 (1980) (No. 3) (denying *status quo* order, explaining: "[t]he NMB has never claimed to have any power to control a carrier's actions or to vindicate the ultimate rights of a representative. Its only function is to investigate and determine who is the employee's representative."); *Pan American World Airways, Inc.*, 7 NMB No. 110 (1980) (denying *status quo* order, stating that "the issuance of such a bargaining order is an adjudicatory matter properly in the province of the federal courts rather than the National Mediation Board").

[9] *Chicago & North Western Railway Co. v. United Transportation Union*, 402 U.S. 570, 580-81 (1971); *Air Line Pilots Association, International v. Scheduled Skyways, Inc.*, 567 F. Supp. 171, 180-81 (W.D. Ark. 1983).

according to respondents, "ALEA can ask the NMB to adopt a policy whereby the certificate of the union at an 'acquired' carrier continues to be effective until an election is held to determine the post-merger employee representative" (Opp. at 16). The NMB, however, is apparently of the view that it has no such authority. Thus, for example, the NMB has explained that "it is clear that any person aggrieved by action of another must seek damages or injunctive relief *(including a status quo order) in a court of competent jurisdiction, and not from the NMB." Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 13, 18 (No. 3) (1980) (emphasis added).

Respondents' second suggestion is that "ALEA can ask the NMB to investigate whether Republic or Northwest is the 'surviving' carrier" (Opp. at 16). Even if the NMB were inclined to grant such a request, such an investigation would not lead to an effective remedy for violations of the RLA either prior to the consummation of a merger (when the NMB will not assert jurisdiction), or while the NMB is conducting such an investigation. Moreover, since the NMB has no authority to issue a bargaining order, *Pan American World Airways, Inc.*, 7 NMB (No. 110) (1980); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 304 (1943), even if its investigation determined that Republic were the surviving carrier, it could not remedy, on an interim basis, respondents' violations of the RLA by ordering respondents to recognize and bargain with ALEA.

Respondents' third suggested NMB-related remedy is that "ALEA can petition the NMB for an election" (Opp. at 16). ALEA, of course, has done just that; but, for the reasons stated in ALEA's petition and herein, such a proceeding cannot remedy the violations of the RLA which have occurred and will continue to occur pending NMB certification of a representative.

E. The Decision Below is Inconsistent With the Decisions of This Court

Respondents also argue that the decision below is not inconsistent with the decisions of this Court (Opp. at 17-20). Their argument is, in essence, that *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), is the controlling decision and is consistent with the decision below. *Switchmen's Union*, however, was a case in which the union sought to set aside an NMB certification, 320 U.S. at 299; the

right sought to be vindicated was the right to the determination of the employees' representative, the very representation question to be decided by the NMB. *Id.* at 300.

The Court, however, carefully distinguished those situations where, absent federal court jurisdiction, the RLA would be "robbed of its vitality and thwarted of its purpose." *Id.* In recognizing the need for federal court jurisdiction in such situations, the Court cited *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930),[10] and *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), for the proposition that federal court jurisdiction must be available where its absence would render a right provided for in the RLA unenforceable. 320 U.S. at 300.

Thus, *Switchmen's Union* confirms that federal court jurisdiction is available except where a genuine representation question is raised. This Court's decisions thus are inconsistent with the decision below.

II. On the Merits, Respondents Have Violated the RLA

Respondents argue that their recognition of BRAC and IAM does not violate the RLA (Opp. 20-23).

First, respondents argue that "[t]he mere fact that a carrier recognizes and bargains with one union during a representation dispute does not alone constitute unlawful interference or coercion under the Act" (Opp. at 20).[11]

---

[10] Respondents argue that since *Texas & New Orleans Railroad* was decided *before* Section 2, Ninth was added to the RLA, it is no longer viable (Opp. at 18). However, this Court cited *Texas & New Orleans Railroad* approvingly in the *Switchmen's Union* case. 320 U.S. at 300. Moreover, as indicated in *Switchmen's Union*, the purpose of section 2, Ninth was "to strengthen and make more effective the process of collective bargaining," and was "aimed not only at company unions which had long plagued labor relations [citation omitted], but also at numerous jurisdictional disputes between unions." 320 U.S. at 302. It would be ironic, indeed, for a statutory provision with such purposes to be used as the basis for allowing a carrier to select the employees' representative.

[11] While respondents are correct in noting that the gravamen of ALEA's claims concerns Northwest's recognition, bargaining with, and entering into an agreement with other unions prior to the NMB's determining the appropriate craft or class and prior to the NMB's certification of the representative following an election, the impact of Northwest's acts was far from trivial. In addition to the effects of such conduct described in ALEA's petition (at 5-6), the effects include expelling ALEA from the property of the merged carrier and denying ALEA

(footnote continued on next page)

Respondents, however, overlook the critical fact that they have recognized and bargained with BRAC and IAM to the exclusion of ALEA at a time when there could be no good faith basis for believing that the NMB will agree with respondents' definition of the appropriate craft or class or for believing that BRAC and IAM will have a clear majority in whatever craft or class the NMB determines. *See* Petition at 3-4 n.3. Such conduct violates the RLA. *See Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937); *Pan American World Airways, Inc. v. Int'l Brhd of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969).[12] To the extent there is any doubt that such unilaterally determined recognition in the face of pending NMB proceedings violates the RLA, the issue is of sufficient importance to warrant review by this Court.

Respondents also differ with ALEA on the correct interpretation of the NMB's cases, regarding whether certifications of unions on an "acquired" carrier are "extinguished by operation of law" (Opp. at 21), without regard to whether such unions may in fact have the support of a majority of the employees of the merged groups (*see* Petition at 20-24). Respondents thus argue that federal courts may not grant relief in cases like the present case because, they assert, the NMB has adopted a policy that the union on the "acquiring carrier" has no representational rights pending an election—regardless of the percentage of employees it represents. Even if respondents were to be found to be correct, the present case is an appropriate vehicle for the Court to square such a policy with the statutory requirement that a union must be

---

(footnote continued from preceding page)

representatives access during working hours to either the former Republic employees previously represented by ALEA, or the former Northwest employees represented by BRAC and IAM, during the critical period preceding the NMB election. Meanwhile, BRAC and IAM enjoy full access to the voting employees, on company time and on company property. All this has occurred at a time when Northwest had no good faith basis for a belief that BRAC and IAM represent a majority of the post-merger craft or class, or even for a good faith belief as to how the NMB will define the appropriate craft or class. *See* Petition at 3-4 n.3.

[12] Similarly, under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, it is unlawful to recognize or enter into an agreement with a union when there is a pending question of representation. *See, e.g., NLRB v. Hudson Berlind Corp.*, 494 F.2d 1200, 1203 (2d Cir. 1974).

supported by a majority of the employees.[13] 45 U.S.C. § 152, Fourth.

Respondents also argue that Northwest's recognition of BRAC and IAM was lawful because Northwest had a "reasonable basis for believing that its own craft designations would remain in place after merger and that BRAC and IAM would continue to represent a majority of the employees in those crafts" (Opp. at 22). ALEA disputes the factual basis for respondents' assertion. *See* Petition at 3-4 n.3. In any event, since the district court dismissed on jurisdictional grounds, it made no finding on this issue. Therefore, for purposes of this petition, the legality of Northwest's recognition cannot be predicated on its assertions of good faith.

Finally, respondents argue that "whether ALEA or Northwest is correct in its understanding of NMB policy, the pivotal nature of such policy to ALEA's allegations of statutory and contractual violations demonstrates beyond any doubt that this action is fundamentally representational in nature" (Opp. at 23). Respondents' argument is a *non sequitur*: Regardless of the NMB policy as to whether the certification of the acquired union is "extinguished by operation of law" (even where there is doubt as to the appropriate craft or class in the merged employee group and where the majority status of the various unions is in doubt), the relief sought by ALEA is not representational, since ALEA does not ask a court to determine the appropriate craft or class or to certify the collective bargaining representative.

Accordingly, the Court should grant certiorari to consider not only the jurisdictional question, but also the important substantive question of whether a carrier in an airline merger violates the RLA by unilaterally recognizing a union pending NMB determination of the craft or class and certification of the representative, where the carrier cannot determine which union will command a post-merger majority and the proper craft or class is unclear.

---

[13] Indeed, since there may be no judicial review following an NMB certification, *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 300 (1943), there may be no opportunity for such a policy of the NMB to be subjected to judicial scrutiny in light of the RLA unless such scrutiny occurs in a case whose posture is like that of the present case.

CONCLUSION

For the foregoing reasons and for the reasons set forth in ALEA's petition, the petition for certiorari should be granted.

Respectfully submitted,

EUGENE COTTON

Counsel of Record

COTTON, WATT, JONES & KING
Suite 4750—One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590